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CURFEW LAW AGAIN RULED UNCONSTITUTIONAL

For the third time since 2000, a federal court has struck down Indiana's curfew law. On July 23, 2004, U.S. District Judge John D. Tinder of the Southern District of Indiana's Indianapolis Division, issued a preliminary injunction barring police officers from enforcing I.C. 31-37-3-2. The state's curfew law as presently written prohibits minors from being on the street between 11p.m. and 5 a.m. On weekends, minors 15 to 17 years of age can be out until 1 a.m.

Indiana's curfew law was first deemed unconstitutional by Judge Tinder in July, 2000. Following that ruling, the 2001 General Assembly repealed the section of the statute that listed exceptions to the law. In its place, lawmakers added I.C. 31-37-3-3.5, which created an affirmative defense for those engaged in protected expressive activity.

The same Indianapolis family that first challenged the curfew law in 1999, again challenged the amended version of the statute. This time around, however, Judge Tinder denied the family's request for a preliminary injunction. The case then moved to the 7th Circuit and on January 22, 2004, that Court stuck down the curfew law once again. The 7th Circuit said that the amended statute imposed upon the First Amendment rights of juveniles because they were subject to arrest, even if they met one or more of the defenses spelled out in the curfew law.

On March 17, 2004 Governor Joe Kernan signed yet another version of the curfew law as drafted by the 2003 General Assembly. Twelve days after that bill was signed, the ICLU filed a class action lawsuit on behalf of the same Indianapolis family who began the curfew fight four years earlier. The ICLU claimed that the latest version of the law impinged upon the substantive due process rights of parents to raise and control the upbringing of their children. On July 23, Judge Tinder issued yet another injunction preventing further enforcement of the statute.

Rep. Ralph Ayres, R-Chesterton says that he is ready to resuscitate the curfew law during Indiana's 2005 legislative session. A vocal supporter of the curfew law, Ayres says he will be ready to introduce his amended curfew bill on the first day that the legislature is in session.

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- **Pre-Trial Diversion Means "On Bond For Sentencing Purposes**

Christmas v. State, 812 N.E.2d 174 (Ind. Ct. App. 7/22/04). On July 11, 2001, Ricki Christmas entered into an agreement with the prosecutor in Johnson County. By the terms of that agreement the State agreed to withhold prosecution and Christmas agreed that he would admit that he had committed the crime of trespassing earlier that month. Thirteen days later, a Whiteland police officer saw Christmas near the town hall. That officer had in his possession an arrest warrant for Christmas for an unrelated conversion offense. When the officer tried to serve the warrant, however, Christmas ran and refused to stop even when the officer ordered him to do so. Eventually the officer caught up with Christmas and handcuffed him, but only after a struggle. Christmas was charged with resisting law enforcement.

On August 5, 2003, a bench trial was held on both the trespass and resisting law enforcement charges and Christmas was found guilty on both counts. Christmas was sentenced to 365 days, with 30 days executed on the trespass charge. In addition, the court ordered him to serve 365 days on the resisting charge. The court ordered the sentences to run consecutively.

I.C. 35-50-1-2(d) mandates the imposition of consecutive sentences in certain circumstances. That statute says, in relevant part:

> If, after being arrested for one crime, a person commits another crime:
>
> (2) while the person is released:
>
> (A) upon the person's own recognizance; or
>
> (B) on bond...

Christmas contended that because he had entered into an agreement to withhold prosecution on his trespass charge prior to his arrest for resisting law enforcement, he was not "on bond" or "being actively prosecuted for trespass" as of the date of his resisting offense. The Court of Appeals did not agree.

The defendant's agreement to withhold prosecution listed several conditions requiring Christmas's compliance. Included in that agreement was the requirement that Christmas not commit another criminal offense. These conditions were a part of the defendant's agreement and rendered the charges against Christmas ongoing, the Court concluded. As of the date of his arrest for resisting, Christmas was either "released on his own recognizance" or **"**on bond" within the meaning of I.C. 35-50-1-2. The trial court, therefore, properly ordered Christmas's sentences for trespassing and resisting law enforcement to be served consecutively.

- **Restitution Order Improper**

Green v. State, 811 N.E.2d 874 (Ind. Ct. App. 7/15/04). Daniel Green pled guilty to criminal confinement in an open plea that left sentencing to the discretion of the judge. The trial court sentenced Green to 16 years of incarceration and ordered him to pay $1,345 in restitution to the Adams County Prosecuting Attorneys deferral fund. Specifically the trial court noted that the State had received a bill for $1,345 for the forensic sexual assault exam done on the defendant's bodily samples. The court's sentencing order directed Green to pay for that testing with payment to be made to the deferral fund.

I.C. 35-50-5-3(a) governs restitution and says that a court may order restitution to the victim of a crime, the victim's estate or the family of a deceased victim. The statute goes on to set forth factors upon which the court may base its restitution order.

Although the State could be a victim under some circumstances, such was not the case here. The State was not a victim in this case. The State was seeking reimbursement for the cost of a forensic exam performed on the defendant. The Court also noted that even if the State could have been properly considered a victim in this case, Green was only convicted of confinement, not deviate conduct. Earlier Indiana cases have held that a court may not order restitution for a charge that did not result in conviction. The restitution order was reversed.

Recent Decisions Update

Indiana

- **Criminal Rule 4(C) Actions Of Defendant Before Trial Set**

Cook v. State, 810 N.E.2d 1064 (Ind. Sup. Ct. 6/30/04). On Transfer. On December 11, 2001, Steven Cook was arrested and charged with a number of drug related offenses. When he had not yet been brought to trial by December 26, 2002, Cook moved for discharge, alleging a violation of Criminal Rule 4(C) which requires that the State bring a defendant to trial within one year of the defendant having been arrested or charged, whichever occurs later.

Between February 14, 2002, and June 28, 2002, Defendant Cook requested five continuances and on three of those occasions between July 22, 2002, and September 20, 2002, the trial court postponed the proceedings at the defendant's request. No trial date had ever been set as of the date of the defendant's filing of his motion for discharge.

The issue presented in this case was whether a defendant should be charged under Indiana Criminal Rule 4(C) with delays resulting from his actions if those actions are taken before a trial date has been set. When a defendant takes an action which delays the proceeding, that time is chargeable to the defendant and extends the one-year time limit, regardless of whether a trial date has been set or not, the Supreme Court said. In the *Cook* case, the defendant moved to continue the proceedings five times. Those five defense motions caused a total of 103 days delay. The one-year limit established by Criminal Rule 4(C) was therefore extended by that number of days, the Court said. Accordingly, the defendant's trial had to be set no later than March 22, 2003. The March 3, 2003, trial date set by the court was well within the time limit of Criminal Rule 4(C). Cook's right under Criminal Rule 4(C) was not violated, the Court concluded.

U.S. Supreme Court

- **Warned Confession Following Unwarned Confession Inadmissible**

Missouri v. Seibert, 124 S.Ct. 2601 (June 28, 2004). Defendant Seibert's son, afflicted with cerebral palsy, died in his sleep. After the fire Seibert was present when two other sons and some friends discussed burning the family's mobile home to conceal the circumstances of the ill child's death. They hoped by this action to shield Seibert from criminal charges. The fire was set and as a part of the plan an unrelated mentally ill 18-year-old named Donald was left to die in the fire. The fire-starters thought that Donald's presence would prevent investigators from concluding that the ill boy had been left unattended.

When Seibert was arrested, the police did not initially advise her of her *Miranda* rights. They questioned her for 30 to 40 minutes during which time Seibert confessed that the plan was for Donald to die in the fire. The police then stopped the interrogation for twenty minutes. Upon returning, the interrogating officer gave Seibert her *Miranda* rights and obtained a signed waiver. The detective then resumed questioning and got Seibert to repeat her earlier confession. The trial court suppressed the pre-warning statement but admitted the post-warning statement and Seibert was convicted of second-degree murder.

The Missouri Court of Appeals affirmed the conviction. In reversing the Court of Appeals, the Missouri Supreme Court held that, because the interrogation was nearly continuous, the second statement, which was clearly the product of the invalid first statement, should have been suppressed.

A 5-4 U.S. Supreme Court affirmed the Missouri Supreme Court. Four justices concluded that the midstream recitation of warnings after the interrogation and un-warned confession in this case did not comply with *Miranda's* constitutional warning requirement. Seibert's post-warning statements were held to be inadmissible. One justice concluded that when a two-step interrogation technique is used, post-warning statements related to pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made.